

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May

28, 2003

TO : Ronald K. Hooks, Regional Director
Ruth Small, Regional Attorney
Thomas H. Smith, Jr., Assistant to the Regional
Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Mississippi Action for Progress, Inc.
Case 26-CA-21015 512-5009

This Section 8(a)(1) case was submitted for advice as to whether a criminal complaint filed by an Employer manager against an employee Union steward, ultimately dismissed by a state court, was unlawful under the Supreme Court's decision in BE & K.¹ We agree with the Region that the criminal complaint, although non-meritorious, was reasonably based, and thus cannot be attacked as an unfair labor practice. There is also insufficient evidence of a retaliatory motive to impose the costs of litigation upon the employee so as to find the suit unlawful under the test suggested in *dictum* by a majority of the BE & K Court.²

FACTS

1. Background

Mississippi Action for Progress, Inc. (the Employer) operates various daycare and early childhood education centers, including two in Greenwood, Mississippi. Headquartered in Jackson, Mississippi, the Employer also has a regional office in Greenwood. The IUE/CWA (Union) represents the Employer's Greenwood employees and has been negotiating for an initial collective-bargaining agreement with the Employer since its June 2000 certification. Cassandra Townes works at the Employer's Greenwood Early Head Start Center and serves as the Union's chief steward.

2. The Events of November 26, 2002

¹ BE & K Construction Co. v. NLRB, ___U.S.___, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

² Id., 122 S.Ct. at 2402.

At a November 26, 2002 investigatory meeting held at the Employer's regional office, Townes represented employee Kelley, who had been accused of insubordination. Employer Human Resources Officer Mitchell represented the Employer. During the meeting, a question arose as to whether the Employer had provided Kelley with copies of two letters concerning his alleged insubordination. When Townes asked Kelley for copies of the letters as they left the meeting, he told her that he did not have them. Townes then asked to speak with manager Mitchell about the letters.

Townes testified that Mitchell shoved the letters at her and said in an irritated voice, Have the letters, had the letters, what difference did it make? If you want the letters, take the letters. Townes asserts that Mitchell laughed sarcastically, snapped her fingers and tapped her feet. Townes and Mitchell then got into an argument, accounts of which differ.

According to Mitchell,³ Townes called her a clown and said, I got something for you. I will take care of you. Believe me I will take care of you, just like I told you in Jackson. When Mitchell replied that Townes was threatening her like she had done before, Townes repeated that she would "take care of" Mitchell. Mitchell claims that Employer official Jordan then asked Townes to leave, but that Townes ignored him and continued shouting and making threats, and that Townes also refused subsequent demands to leave. Mitchell asserts that this marked the third time Townes had verbally assaulted [her] character and directly threatened her in the presence of others.⁴ Mitchell felt that Townes was capable of carrying out her threats, causing her to fear for her life and safety.

Two other regional office employees gave the Employer written accounts of what transpired on November 26. Bill Mosson stated that Townes and Mitchell were arguing loudly and he saw Jordan standing between them. Mosson heard Townes say that she didn't know why the Employer sent a "clown" like Mitchell to the meeting, that she meant what she said in Jackson, and that Mitchell was going to get hers and that Townes was going to get her. Each called the other a clown. Mosson then stood between them with Jordan. At this time Mitchell told Townes to leave or she would be removed.

³ While Mitchell did not provide a Board affidavit, she set forth her version of the events in a written statement to Employer Regional Manager Jordan.

⁴ Mitchell did not substantiate this assertion.

The other employee, Marley Phillips, stated that she was at her desk when she heard two women arguing. Townes was "hollering" at Mitchell, who asked Townes to leave the building several times. Townes continued yelling at Mitchell, but left shortly after Mitchell announced that she was calling the police.

Townes testified that she accused Mitchell of acting unprofessionally, and Mitchell replied that she treated people accordingly: when she saw a clown she acted like a clown. As Townes left, she passed a mirror and told Mitchell, Look in the mirror -- you're the clown. While in the hallway, each called the other a clown. Townes charged that Mitchell had done the same thing in Jackson.⁵ Mitchell replied, What can you do about it? I called your bluff. I told you that I was going to call the police and shut you up. As Townes walked toward the exit, Mitchell stated that she was going to call the police to have Townes escorted off the property. Townes told Mitchell she was not afraid of her and that she could handle her, and admonished Mitchell to give Kelley a fair hearing. Jordan then walked Townes to the exit. Townes saw Mitchell on the telephone and assumed she was calling the police. Townes and Kelley then left the Employer's regional office.

Kelley testified that Townes returned to the meeting to discuss the missing letters with Mitchell. Although their voices were raised, he did not recall what was said. After a few minutes Mitchell told Townes that she was going to call the police and have Townes escorted out of the building. Kelley asserts that he did not hear Mitchell ask Townes to leave before threatening to call the police, and did not hear either woman use profanity or make threats.

3. The Criminal Complaint

On the afternoon of November 26, Townes arrived at the Greenwood Early Head Start Center. She saw three police cars outside. Rather than return to work, she drove home. The next day Townes learned that sheriff's deputies had been looking for her. Townes contacted the Leflore County Justice Court and discovered that she had been charged with disturbing the peace based upon an affidavit provided by

⁵ Townes was referring to a September 13 Employer hearing at which she represented a terminated employee. According to Townes, Mitchell made faces at her during the hearing, and Townes mouthed that Mitchell was "being silly." Mitchell then threatened to call the police on Townes, but did not do so.

manager Mitchell.⁶ Townes then went to the court and filed an identical charge against Mitchell, as well as a simple assault charge against manager Jordan.

On January 14, 2003 the local county court dismissed all three charges. It is unclear on what grounds the court ruled.

ACTION

We agree with the Region that Mitchell's criminal complaint, although found non-meritorious by the local county court, was reasonably based. We also conclude that there is insufficient evidence to establish that she would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome."⁷ Thus, consistent with the First Amendment protections discussed by the Supreme Court in BE & K, the Region should dismiss this charge, absent withdrawal.

Initially, we agree that the lawfulness of Mitchell's criminal complaint raises First Amendment considerations under the Supreme Court's decision in Bill Johnson's.⁸ In Johnson & Hardin Co.,⁹ the Board stated that filing a criminal complaint with governmental officials is, like filing a civil lawsuit, "an aspect of the right to petition

⁶ The charge alleged a violation of Miss. Code Ann. § 97-35-15, Disturbance of the Public Peace, which provides that,

"[a]ny person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor...."

A conviction is punishable by a fine of up to \$500, or up to six months imprisonment in county jail, or both.

⁷ See BE & K, 122 S.Ct. at 2402.

⁸ Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

⁹ 305 NLRB 690, 691 (1991), enfd. in relevant part 49 F.3d 237 (6th Cir. 1995) (Bill Johnson's analysis, used to evaluate lawfulness of alleged retaliatory civil suits, applied to criminal trespass complaints).

the Government for redress of grievances."¹⁰ Johnson & Hardin is thus consistent with BE & K, 122 S.Ct. at 2396, where the Court observed that "the right to petition extends to all departments of the Government."¹¹

In BE & K, the Court reconsidered the circumstances under which the Board could find a "completed" lawsuit to be an unfair labor practice.¹² In Bill Johnson's, the Court appeared to articulate two standards for evaluating alleged retaliatory lawsuits: one for ongoing suits and one for concluded suits.¹³ Bill Johnson's held that the Board may, consistent with the First Amendment, only halt prosecution of an ongoing lawsuit if it lacks a reasonable basis in fact or law and was brought with a retaliatory motive.¹⁴ The Court stated that a concluded lawsuit which resulted in a judgment adverse to the plaintiff, or which was withdrawn or otherwise shown to be without merit, could be attacked as an unfair labor practice if it was filed with a retaliatory motive.¹⁵ Thus, under Bill Johnson's, it appeared that the Board could find that a completed lawsuit, even if reasonably based, was an unfair labor practice if it was unsuccessful and was filed to retaliate against the exercise of rights protected under the Act.

The Supreme Court in BE & K rejected the Board's application of Bill Johnson's for adjudicating unsuccessful but reasonably based lawsuits.¹⁶ The Court found that the Board's reading of Bill Johnson's was overly broad because the class of lawsuits that the Board wished to proscribe included a substantial portion that involved genuine "petitioning" protected by the Constitution.¹⁷ The Court thus indicated that the Board could no longer rely on the

¹⁰ 305 NLRB at 691.

¹¹ See also Mr. Z's Food Mart, 325 NLRB 871, 871 n. 2, 894 (1998), enf. denied in part, 265 F.3d 239 (4th Cir. 2001); Control Services, 315 NLRB 431, 455-56 (1994).

¹² 122 S.Ct. at 2397.

¹³ 461 U.S. at 747-749.

¹⁴ Id. at 748-749.

¹⁵ Id. at 747, 749.

¹⁶ 122 S.Ct. at 2397, 2400, 2402.

¹⁷ Id. at 2399 ("...even unsuccessful but reasonably based suits advance some First Amendment interests").

fact that a lawsuit was ultimately meritless, but must determine whether it was reasonably based regardless of its outcome on the merits.¹⁸

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."¹⁹ The Court criticized the Board for having adopted a standard in reasonably based suits of finding retaliatory motive if the lawsuit itself related to protected conduct that the petitioner believed was unprotected.²⁰ Similarly, the Court reasoned that inferring a retaliatory motive from evidence of a respondent's union animus would condemn genuine First Amendment "petitioning" in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"²¹ In *dictum*, however, the Court suggested that an unsuccessful but reasonably based lawsuit could be considered an unfair labor practice if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome."²²

Because the Supreme Court in BE & K did not enunciate the standard for determining whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. In Bill Johnson's, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.²³ Thus, while "genuine disputes about material historical facts should be left for the state court, plainly unsupportable inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."²⁴ Further, just

¹⁸ Id. at 2399-2402.

¹⁹ Id. at 2400-2401.

²⁰ Id. at 2400 ("...the Board's definition broadly covers a substantial amount of genuine petitioning").

²¹ Id. at 2401 (emphasis in original), citing Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61 (1993).

²² 122 S.Ct. at 2402.

²³ 461 U.S. at 744-746.

²⁴ Id. at 746, n. 11.

as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."²⁵ Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In the instant case, Mitchell's criminal complaint against Townes is akin to a completed, unsuccessful lawsuit, because the county court dismissed the charge. However, we cannot say that Mitchell's criminal complaint was baseless. First, Bill Johnson's does not permit the Board to make credibility determinations or to draw inferences from disputed facts. Here, Mitchell's version of events, which Mosson and Phillips corroborated in material respects,²⁶ differs from Townes' version of events, which Kelley did not specifically corroborate.²⁷ Because the Board cannot make a credibility resolution or draw inferences from these disputed facts, we have no basis to challenge Mitchell's belief that Townes had in fact disturbed the peace, or to dispute that she feared for her life and safety.²⁸ Second, under Mississippi law, a disturbance of the peace can occur in a place of business.²⁹ Thus, Mitchell's criminal complaint, attacking Townes' conduct at the Employer's regional office, was not plainly foreclosed by applicable state law.

²⁵ Id. at 746.

²⁶ Like Mitchell, Mosson stated that Townes told Mitchell she "was going to [get] hers and that [Townes] was going to get her," and Phillips stated that Townes was "hollering" at Mitchell and continued yelling at her even after being asked to leave the building several times.

²⁷ Townes did not specifically deny threatening Mitchell, and Kelley merely testified that he did not hear any threats.

²⁸ See generally Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 962 (2000), reconsideration denied 336 NLRB No. 25 (September 28, 2001). Compare Geske & Sons, Inc., 317 NLRB 28, 29, 57-58 (1995), *enfd.* 103 F.3d 1366, 1376 (7th Cir.), *cert. denied* 522 U.S. 808 (1997).

²⁹ See Taylor v. State, 396 So.2d 39, 41 (Miss. 1981) ("public place," for purposes of Miss. Code Ann. § 97-35-15, Disturbance of the Public Peace, includes one where, by general invitation, members of the public attend for business reasons).

Finally, there is no evidence that Mitchell's criminal complaint would not have been brought "but for a motive to impose the costs of the litigation process, regardless of the outcome," the test a majority of the justices suggested might constitute an unfair labor practice in BE & K. Accordingly, the instant charge should be dismissed, absent withdrawal.³⁰

B.J.K.

³⁰ See Dilling Mechanical Contractors, Inc., Cases 25-CA-25094, 25-CA-25485, Advice Memorandum dated December 11, 2002. We express no opinion on whether (a) Mitchell's conduct could be attributed to the Employer and (b) whether the criminal complaint was filed to retaliate against Townes' exercise of protected concerted activities under Section 7 of the Act.